United States Court of Appeals

for the Second Circuit

APPENDIX

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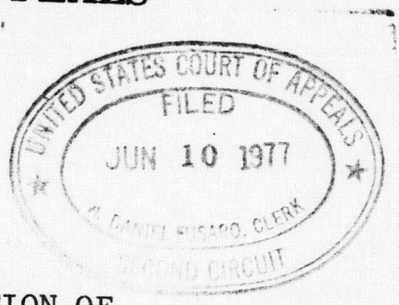
77-7180

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner-Appellee,

- against -

KENTILE FLOORS, INC.,

Respondent-Appellant.

BPLS

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

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77 civ 400 — JUDGE BRIEANT — 7 7 civ

DATE	NR.	PROCEEDINGS
1-28-77	1.	Filed Petition to confirm Arbitration Award.
1-28-77	2.	Filed Petitioners Memorandum in support of petition to Confirm Arbitration Award.
2-3-77	3	Fld Notice of Petition for an order & Judgment confirming the award of the arbitrator...etc.....ret 2-28-77-9:30AM Rm 705.
3-10-77	4	Fld Respondent's Noltice of Cross Petition for ahearing on 3-15-77-Rm 905-9:30AM.
3-10-77	5	Fld " Memo in support of its Cross Petition to vacate arbitration award in part.
3-10-77	6	Fld Respondent's answer & Cross Petitiontio vacate arbitration award. p/c
3-14-77	7	Fld Petitioner's Reply Memo in support of its application to confirm arbitartion award.
3-14-77	8	Fld Petitioner's atty's affdvt for attys' fees.
3-14-77	9	Fld Peitioner's answer to x-petition vevl
3-16-77		Fld Memo End on bk of x-petition fld 3-10-77=Cross Petition denied..So Ordered.....Brieant,J. mn
3-16-77		Fld Memo-End on bk of Petition fld 2-3-77= Accordingly, each pty should bear its own legal expenses. The Court will enter judgment. So Ordered....Brieant,J. mn
3-16-77	10	Fld Judgment#77,392...Adjudged, that the Petition herein is granted to the extent therein set forth, and the Cross- Petition fld by Respondent is denied. and that Petitioner Dist. #15 International Asso. of Machinists and Aerospace Workers, AFL-CIO, as collective bargaining agent for Wm Anzueta and S. Wm. Jute, as interests may appear, recover of Respondent Kentile Floors, Inc. the total sum of $377.00 together with its costs to be taxed...Brieant,J. mn.....Judgment Entered 3-17-77--Clerk. ./.....dkd 3-17-77.....
4-15-77	11	Fld Respondent's Notice of Appeal to USCA from judgment ent 3-16-77...mn on 4-18-77- to :Vladeck, Elias, Vladeck & Lewis.

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A-4

NOTICE OF PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

-against-

KENTILE FLOORS, INC.,

Respondent.

----------X

77 Civ. 400 (CLB)

NOTICE OF PETITION

S I R S :

PLEASE TAKE NOTICE that upon the petition of District No. 15, International Association of Machinists and Aerospace Workers, AFL-CIO ("District No. 15"), dated and verified January 20, 1977, the collective bargaining agreement between petitioner and respondent, annexed thereto as Exhibit "A", and the award of the arbitrator dated and acknowledged July 1, 1976, annexed thereto as Exhibit "B", the undersigned will move this Court on MONDAY, February 28, 1977 before Hon. CHARLES BRIEANT, at 9:30 A.M. or as soon thereafter as counsel can be heard, in Room 705 of the United States Court House, Foley Square, New York, New York, for an order and judgment:

1. Confirming the award of the arbitrator in all respects;

2. Directing respondent to make whole Stephen Jute and

William Anzueta, on whose behalf the petition is submitted by District No. 15, by paying them the interest due on the back pay awarded by the arbitrator, at the rate of six percent (6%) per annum;

3. Awarding petitioner costs, disbursements and reasonable attorneys' fees incurred in this proceeding, occasioned, as it is, by the deliberate violation of the said award; and

4. For such other, further and different relief as to the Court seems just and proper.

Dated: New York, New York
January 20, 1977

Yours, etc.

VLADECK,ELIAS,VLADECK&LEWIS,P.C.
Attorneys for Petitioner,
District No. 15
1501 Broadway
New York, New York 10036
(212) 354-8330

TO: FELLNER and ROVINS, ESQS.
Attorneys for Respondent
230 Park Avenue
New York, New York 10017

KENTILE FLOORS, INC.
58 Second Avenue
Brooklyn, New York 11215
Attention: Personnel Manager

PETITION TO CONFIRM ARBITRATION AWARD

----------X

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

-against-

KENTILE FLOORS, INC.,

Respondent.

----------X

77 Civ. 400 (CLB)

PETITION TO CONFIRM ARBITRATION AWARD

TO THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK:

The petition of District No. 15, International Association of Machinists and Aerospace Workers, AFL-CIO ("District No. 15") respectfully shows:

1. Jurisdiction of this Court is specifically invoked pursuant to Section 301 of the Labor-Management Relations Act, as amended ("LMRA"), 29 U.S.C. §185, and further, remedies are invoked pursuant to the United States Arbitration Act, 9 U.S.C. §1, et seq.

2. Petitioner, District No. 15, is a labor organization within the meaning of the LMRA, 29 U.S.C. §152(5), with its principal place of business at 7 East 15th Street, New York, New York, within the Southern District of New York.

3. Upon information and belief, respondent, Kentile

Floors, Inc., is a domestic corporation and an employer within the meaning of the LMRA, 29 U.S.C. §152(2), with its principal place of business at 58 Second Avenue, Brooklyn, New York.

4. Petitioner (with its affiliate, Long Island City Lodge 295)and respondentsare parties to a collective bargaining agreement, currently in force, which is effective by its terms from July 9, 1975 to July 8, 1978. A true copy is annexed hereto as Exhibit "A". Said agreement contains, inter alia, provisions for the resolution of grievances.

5. On or about December 5, 1975, a dispute arose between the parties regarding the discharges of Stephen Jute and William Anzueta.

6. Pursuant to Article 30 of the collective bargaining agreement, petitioner submitted the discharge grievances to an arbitrator, Bertram Kupsinel, under the auspices of the American Arbitration Association. A hearing was held on May 19, 1976 at which all parties appeared and presented evidence.

7. Thereafter, the arbitrator rendered an award, dated and acknowledged July 1, 1976, which was duly delivered to the parties. A true copy of the award is annexed hereto as Exhibit "B". The award sustained the grievances of petitioner and reduced the discharges to suspensions and ordered the

reinstatement of Stephen Jute and William Anzueta to their former positions with respondent. The said award further directed respondent to make Stephen Jute and William Anzueta whole by paying them back pay with interest thereon at the rate of six percent (6%) per annum.

8. Respondent has failed and refused to comply with the said award by refusing to pay the six percent (6%) interest due on the back pay.

9. By the aforesaid conduct, respondent has violated and continues to violate the collective bargaining agreement. Article 27.1 thereof specifically provides that the decision of the arbitrator shall be final and binding on the parties. No provision thereof limits the remedies which may be fashioned by the arbitrator to resolve a dispute.

WHEREFORE, petitioner respectfully prays for an order and judgment:

1. Confirming the award of the arbitrator in all respects;

2. Directing respondent to make whole Stephen Jute and William Anzueta, on whose behalf the petition is submitted by District No. 15, by paying them the interest due on the back pay awarded by the arbitrator, at the rate of six percent (6%) per annum;

3. Awarding petitioner costs, disbursments and reasonable attorneys' fees incurred in this proceeding, occasioned , as it is, by the deliberate violation of the said award; and

4. For such other, further and different relief as to the Court seems just and proper.

Dated: New York, New York
January 20, 1977

Yours, etc.

DISTRICT NO. 15, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

7 East 15th Street
New York, New York 10003
(212) 255-6303

By: Jerry O'Leary
Jerry O'Leary
Business Representative

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JERRY O'LEARY, being duly sworn, deposes and says:

I am a Business Representative of petitioner, District No. 15. I have read the annexed Petition to Confirm Arbitration Award, know the contents thereof and the same are true to my knowledge, except as to those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

Jerry O'Leary
Jerry O'Leary

Sworn to before me this
20th day of January, 1977.

Robert L. Jauvtis

ROBERT L. JAUVTIS, ESQ.
Notary Public, State of New York
No. 31-45-2628
Qualified in New York County
Commission Expires March 30, 1978

EXHIBIT A TO PETITION - COLLECTIVE BARGAINING AGREEMENT (EXCERPTS)

KENTILE FLOORS, INC.

-and-

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and LONG ISLAND CITY LODGE 295

A G R E E M E N T

July 9, 1975 to July 8, 1978

ARTICLE 3. - Rights of Management

3.0 Subject to the express provisions of this agreement, and the collective bargaining rights of the Union, the Company shall have the sole right to conduct its business and manage its affairs as the Company deems expedient. The Company shall have freedom in the selection of employees, the increase or decrease in the working force, the rearrangement of departments and operations, the transfer of equipment to other locations, the scheduling of production, the methods, processes and means of manufacturing, the installation of new equipment or machinery, the training of personnel, the number of shifts to be operated and the assignment of work to specific employees or to specific equipment or machines in a department. The foregoing specification of particular rights does not limit the general rights of the Company to manage its business and to operate its establishment with maximum efficiency and at the lowest cost, in order to fulfill its obligations to its customers and preserve its competitive and financial position, so that it may carry out its obligations to the employees.

ARTICLE 10. - Overtime

10.0 Time and one-half shall be paid in each or any of the following instances:

A. All work performed in excess of eight (8) hours in any one working day.

B. All time worked in excess of forty (40) hours (for which overtime has not previously been earned) in any week

C. All work performed on Saturday.

10.1 - A. Double time shall be paid for all work performed on Sunday.

B. For all work performed on the following holidays:

New Year's Day	Labor Day
Washington's Birthday	Election Day
Good Friday	Thanksgiving Day
Memorial Day	Day after Thanksgiving
Independence Day	Day before Christmas
Christmas Day	

Employees shall be paid time and one-half their regular straight time rate for each hour worked on each such holiday, in addition to the regular holiday pay.

C. Employees required to work on any of the above named holidays shall be given forty-eight (48) hours' prior notice, except in emergencies.

10.2 The Company will make every reasonable effort to distribute overtime equally among employees in their respective classifications. The Company agrees to make available to the Union a record of such overtime work for examination by the Union Representative.

10.3 Any employee who has worked overtime at any time in the work week shall be permitted to work his regularly scheduled hours for the balance of the work week.

10.4 In incorporating and applying the preceding provisions regarding hours of work and overtime compensation, it is mutually understood and agreed as follows:

(a) An established work day, as used solely for the purpose of computing Saturday, Sunday and holiday overtime, is a twenty-four (24) hour period beginning at 8:00 A.M. of the Saturday, Sunday or holiday.

(b) Employees who are scheduled for seven continuous days' work, including Saturday and Sunday, due to overhaul or emergency schedule, are to be given one (1) scheduled day off for rest at the completion of the overhaul or emergency.

(c) Whenever the scheduling of an overhaul or an emergency is such that a shift works a double shift in one day to start a job, then those

employees working the double shift, upon completion of the scheduled overhaul or emergency must take one (1) scheduled day off for rest when breaking back to their normal scheduled shift.

(d) A first shift employee, who is put on the 12 - 8 shift in an emergency or overhaul schedule, shall be entitled, when the shift schedule is finished, to work out the following 8 - 4 shift on a straight time basis, if the employee so desires. This is not to include employees covered in paragraphs "b" or "c".

(e) An employee, who is scheduled on a shift change for overhaul or emergency, who does not start with a double shift as in "c" above, or who does not work a single eight (8) hour shift as in "d" above, but who works more than eight (8) hours but less than sixteen (16) hours terminating at 8:00 A.M. on such shift change, shall be permitted if he so desires to work that portion of the following 8:00 A.M. to 4:00 P.M. shift at straight time, to give him a total of sixteen hours' work.

ARTICLE 26. - Grievance Procedure

26.0 For the purpose of this agreement the term "grievance" means any dispute between the Company and the Union, or between the Company and any employee concerning interpretation or application of this Agreement.

26.1 Any Union grievance shall be settled in accordance with the following grievance procedure:

A. The dispute or grievance shall be taken up by the Shop Steward, the aggrieved employee and the foreman or shift supervisor involved. The foreman or shift supervisor must give his answer within two (2) working days. If the grievance is not settled by the foreman or shift supervisor within two (2) working days after the grievance is presented to the foreman or shift supervisor, the Shop Steward will advise the Chief Steward, who will reduce the grievance to writing and furnish a copy of such grievance to the Departmental Supervisor or the Production Manager. Written grievances shall be signed by the employee or employees involved, or by the Chief Steward. The Chief Steward shall discuss the matter with the Departmental Supervisor or the Production Manager. If either of the parties requests the presence of the aggrieved

employee or employees involved in the grievance, such employee or employees shall be present during the discussions. Prior to such discussion the written grievance shall be submitted to the Departmental Supervisor or the Production Manager by the Chief Steward and within forty-eight (48) hours after such discussion, the Departmental Supervisor or the Production Manager shall notify the Chief Steward of the dispostion in writing.

B. If the grievance is not settled by the Chief Steward and the Departmental Supervisor or the Production Manager within forty-eight (48) hours after such discussion, the Chief Steward shall present the grievance to the shop committee who shall investigate, present and discuss such grievance with an authorized representative of the Company. If no satisfactory settlement is reached between them within two (2) working days, then;

C. The shop committee shall call in a representative of the Union who shall meet with the authorized representative of the Company and the shop committee.

D. In the event the grievance or dispute is not settled in a manner satisfactory to the grieving party (the Union or the Company) then the grieving party has the right and authority to submit such grievance or dispute to arbitration in the manner hereinafter provided.

26.2 Nothing contained herein shall prevent an employee from exercising his rights to process his own grievance. In such case, however, the individual grievance shall be processed in accordance with the provisions of this agreement and the Shop Steward or the shop committee as the case may be, shall be notified and shall be permitted to attend at the processing of the grievance and no settlement inconsistent with the provisions of this Agreement shall be made.

26.3 When the Company notifies the Union of a grievance against an employee, the Company shall, at that time, furnish to the Union a statement of the charge or charges which are the subject of the grievance. No other charges except those given by the Company to the Union shall be considered in the grievance or by an arbitrator in the event the grievance is not settled.

26.4 The grievance procedure and arbitration provided for herein shall constitute the sole and exclusive method of determination, decision, adjustment or settlement between the parties of any and all grievances as herein defined and the grievance procedure and

arbitration provided herein shall constitute the sole and exclusive remedy to be utilized by the parties hereto for such determination, decision, adjustment or settlement of any and all grievances as herein defined.

ARTICLE 27. - Arbitration

27.0 If the above procedure has failed to settle the grievance within ten (10) working days, either party may submit the issue to the American Arbitration Association for the designation of an impartial arbitrator.

27.1 The decision of the arbitrator shall be final and binding on both parties and shall conclusively determine the subject of the arbitration for the duration of this Agreement.

27.2 Any expenses of the arbitrator shall be borne by and divided equally between the parties, and each party shall pay any expense including working time of any of its own witnesses.

27.3 Either party to this Agreement is permitted to call in employee witnesses and submit evidence in any arbitration proceeding for the purpose of substantiating their respective contentions or claims. A record of grievances and the disposition thereof shall be kept and copies be furnished all parties in interest, including aggrieved employee or employees.

ARTICLE 30. - Discharge and Discipline

30.0 The Company retains the right to discharge or discipline any employee for just cause. Discharges and disciplinary action shall constitute cases which come under the method of adjusting grievances hereinabove provided and shall be subject to arbitration if not amicably settled. All claims for unjustifiable discharge and disciplinary action shall be made in writing within ten (10) working days after the date of discharge; otherwise, such claim shall be deemed to have been waived.

30.1 In the event an employee is suspended or discharged, a Company representative shall notify a representative of the Union of the action taken. The disciplined employee shall be allowed to remain in the Personnel Office until he has seen a Union representative.

EXHIBIT B TO PETITION - AWARD OF ARBITRATOR KUPSINEL

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

DISTRICT NO. 15, IAM, AFL-CIO

and

KENTILE FLOORS, INC.

CASE NUMBER: 1330-1951-75

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, ~~and dated~~ and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The Employer discharged the Grievants S- J- and W- A- without just cause.

Grievant S- J- shall be notified by the Employer that he was suspended without pay for a two week period from December 5, 1975.

Grievant W- A- shall be notified by the Employer that he was suspended without pay for a one week period from December 5, 1975.

The Employer shall offer the Grievants reinstatement to their former positions with all of their seniority and other privileges.

The Employer shall reimburse the Grievants in accordance with the remedy set forth above.

Bertram T. Kupsinel

BERTRAM T. KUPSINEL, Arbitrator

STATE OF New York
COUNTY OF Westchester } ss.:

MORTON MOSKOWITZ
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-0114045196 28
Qualified in Westchester County
Commission Expires March 30, 1977

On this 1st day of July, 19 76, before me personally came and appeared BERTRAM T. KUPSINEL

to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Morton Moskowitz

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AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION PANEL

In the Matter of the Arbitration between	
DISTRICT NO. 15, IAM, AFL-CIO	OPINION AND AWARD
and	Case No. 1330-1951-75
KENTILE FLOORS, INC.	

APPEARANCES

FOR District No. 15, IAM, AFL-CIO
(Herein called the Union)

Vladeck, Elias, Vladeck & Lewis, P.C.
by Judith P. Vladeck, Esq.

Jerry O'Leary, Rep.

FOR Kentile Floors, Inc.
(Herein called the Employer)

Fellner and Rovins
by Carl A. Schwarz, Jr., Esq.

Albert Kurz, Personnel Mgr.

THE ISSUE

The parties stipulated that the issue is: Whether or not Stephen Jute and William Anzueta were discharged for just cause, and, if not, what shall be the remedy?

THE ARTICLES OF THE AGREEMENT

Article 3 - Rights of Management

3.0 Subject to the express provisions of this agreement, and the collective bargaining rights of the Union, the Company shall have the sole right to conduct its business and manage its affairs as the Company deems expedient. The Company shall have freedom in the selection of employees, the increase or decrease in the working force, the rearrangement of departments and operations, the transfer of equipment to other locations, the scheduling of production, the methods, processes and means of manufacturing, the installation of new equipment or machinery, the training of personnel, the number of shifts to be operated and the assignment of work to specific employees or to specific equipment or machines in a department. The

foregoing specification of particular rights does not limit the general rights of the Company to manage its business and to operate its establishment with maximum efficiency and at the lowest cost, in order to fulfill its obligations to its customers and preserve its competitive and financial position, so that it may carry out its obligations to the employees.

Article 8 - Hours of Work

8.0 Eight(8) consecutive hours in a regular work shift exclusive of a lunch period shall constitute a normal day's work.

8.1 Five(5) days, Monday through Friday, shall constitute a normal work week.

- - -

Article 30 - Discharge and Discipline

30. The Company retains the right to discharge or discipline any employee for just cause. Discharges and disciplinary action shall constitute cases which come under the method of adjusting grievances hereinabove provided and shall be subject to arbitration if not amicably settled. All claims for unjustifiable discharge and disciplinary action shall be made in writing within ten (10) working days after the date of discharge; otherwise, such claim shall be deemed to have been waived.

30.1 In the event an employee is suspended or discharged, a Company representative shall notify a representative of the Union of the action taken. The disciplined employee shall be allowed to remain in the Personnel Office until he has seen a Union representative.

THE FACTS

A. Background

Basically, this dispute concerns the discharge of two employees for refusing to work overtime. The Union concedes that overtime is not considered "voluntary" in that it has not succeeded in obtaining such a provision in past negotiations. The maintenance department employees were regularly scheduled to work on Saturdays at overtime rates and occasionally worked overtime during the week. Although the grievances, as filed, complained of "excessive overtime", and the Employer was prepared to present evidence of a statistical nature in this regard, it became evident at the hearing that the amount of overtime was not the issue, rather, the issue was whether the Employer was justified in discharging the Grievants in the circumstances herein.

The procedure for obtaining needed employees for overtime work is for the supervisor to inform the shop committeeman (union representative) how many

men are needed. This is done to assure a fair distribution of overtime work. The shop committeeman then advises the supervisor which individuals will be working. If the shop committeeman can't obtain the number of required employees, then the supervisor tries to get the required number by again asking employees to work overtime voluntarily. Should the supervisor still fail to obtain the required number of men, he will then go to the man with the least seniority and will order him to work overtime unless the man provides a reason which is acceptable to the supervisor as a valid excuse for not requiring him to work overtime. Frank Castelluccio, the Maintenance Superintendent for the past 2½ years and prior to that, a maintenance mechanic for about 18 years, recalls one incident which took place about 1957 or 1958, where a lead man named "Skippy" was fired for refusing to work on a Saturday. This created a walkout and subsequently "Skippy" was brought back to work. Castelluccio stated that "Skippy" may have been fired twice, but he could not recall anyone else being fired for refusing to work overtime. The only other time that Castelluccio had to go to the seniority list to obtain employees for overtime work was about a year before the two Grievants were discharged, and at that time, there was no problem because the employees worked when told to. According to Albert Kurz, the Personnel Manager, that was the only time since October, 1973 where overtime was ordered.

Introduced into evidence was an arbitration award issued in 1971, concerning the refusal of eight employees of the Employer to work pre-shift overtime. The disciplinary suspension of one day was determined by the Arbitrator to be for just cause.

The two Grievants had the same seniority date, September 16, 1974. Each testified that he had worked overtime during the week and on Saturdays. Each stated that he had never heard that anyone would be discharged for refusing to work overtime prior to the date he was discharged.

B. THE EVENTS OF DECEMBER 5, 1975

On Friday, December 5, 1975, two emergencies occurred, which required a total of seven maintenance employees to work overtime. At the time, there were eighteen men in the maintenance department. Shop Committeeman James Tierney was able to obtain only five volunteers and told Castelluccio that he could not get two more men. Castelluccio checked with the other men, but not the two Grievants, and they all said no. He then went to the seniority list. The first employee(at the bottom of the list) said he had to take his wife to the Doctor to keep an appointment. This reason was accepted and then Castelluccio called in Grievant W- A-. According to Castelluccio, W- A- said he had to pick up his car and go shopping. He asked W- A- to wait. He then called in Grievant S- J-. S- J- said "I definitely will not work." Castelluccio asked why, but there was no answer. Castelluccio asked S- J- to wait outside. He then went to a grievance meeting which was in progress and called Albert Kurz, the Personnel Manager out of the meeting. He was told by Mr. Kurz what to do, and then returned to the conference room and told the shop committeemen that he was going to terminate W- A- and S- J-, that W- A-'s excuse was that he had to go shopping and pick up his auto and that S- J- gave no excuse, he just refused. Castelluccio then returned to his office and again asked W- A- not to refuse him. W- A- responded, "The heck with it. If I accept, you'll think I'm afraid." At this point in time, about 3:30 p.m., Castelluccio terminated the two

Grievants. He then got two other employees to work that night. According to Castelluccio, he told both Grievants that if they refused him, he would have to terminate them and he said this before he told each to wait in the outer office. When Castelluccio spoke to the Grievants in his office, two other supervisors, Brathwaite and Feninger, were present. Castelluccio also stated that when he had been shop steward, it was customary to have a shop steward present before any disciplinary action was taken, but on this occasion, he had notified the grievance committee and had explained that the Grievants would be discharged.

Gilbert Liscano, employed by this Employer for 27 years, and shop steward for a number of years testified that although he heard Castelluccio say, when he came into the grievance meeting, that he was going to put men to work overtime and if they didn't work he would fire them, he never heard him say he was going to fire S- J- and W- A-. Furthermore, according to Liscano, Castelluccio came into the meeting room only once. After the meeting,Liscano saw the two men who told him they had been fired and had five minutes to leave. He was unable to talk to Castelluccio that day.

The Grievant W- A- testified that he worked regularly on Saturdays, which was overtime, and at times he worked double shifts and at times before the regular starting time and he had never had any trouble in regard to overtime work. He stated that it was not usual to work on a Friday night. He has a sick wife and two young children and he goes shopping on Friday nights. On Friday, December 5, 1975, he had his car in the paint shop and he had to pick it up that evening. About 2:15 p.m., Castelluccio called him to his office and said there was an emergency and he needed a crew to work overtime. W- A- said he couldn't-- he had things to do. Castelluccio then said "Please." W- A- replied "Let me think about it." He then left and telephoned the paint shop. The paint shop said they don't store cars over the weekend and they would put the car out on the street. W- A- returned and told Castelluccio, "I'm sorry but I can't." Castelluccio then went to the personnel office, returned and told W- A- "I'm sorry, but you're going to be fired". W- A- responded, "Once in a blue moon, I can't work overtime and you're going to fire me. If you think its right or if personnel told you, then fire me." W- A- did not recall saying that if he worked, they'll think he's afraid. W- A- did not tell Castelluccio that he wanted a union representative, but when he went to look for one, they were still in the meeting. Castelluccio's assistant, George (Feninger) told him he had five minutes to get out and to leave without talking to anyone and George took his badge and helmet. As he was leaving, he saw Liscano, the shop steward and told him what had happened. W- A- added that he did tell Castelluccio that the paint shop would not store his car for the weekend and that he had to pick up the car and go shopping. He said he didn't get a chance to tell Castelluccio about his sick wife. He said he had told him about his sick wife a month before. (Introduced into evidence was a handwritten note, purportedly from the Earl Scheib paint shop, stating that it was necessary for W- A- to pick up his car by 5 p.m. on December 5, 1975.)

Grievant S- J- testified that he had had an accident in June, but continued to work overtime regularly after he returned to work on September 2, 1975. On December 5, about a minute past 2:00 p.m., when he was on the second coffee break Castelluccio asked him if he could work overtime. He replied that he would not be able to because he had a Doctor's appointment. About 2:20 p.m., Castelluccio called him into the office and asked if he would be able to work. S- J- replied

that he was not able to work and Castelluccio did not give him a chance to say he had a Doctor's appointment, but said "I will have to fire you." S- J- then went to the locker room where he saw the other Grievant. Then George Feninger (Castelluccio's assistant) came into the locker room and said, "The instructions from upstairs are that you have five minutes to leave the premises and don't talk to anybody." As the Grievants were leaving, they met Gil Liscano, the shop steward. They went to the cafeteria where Liscano took notes on what happened. They then went to the maintenance office where they saw Castelluccio and Kurz, the Personnel Manager. S- J- added that he understood that he had to work overtime, but he had never been told before that if he refused to work overtime, that he would be fired. S- J- stated, on cross-examination, that both he and W- A-, signed grievance forms in the cafeteria that same day. The grievance forms read, identically, as follows:

> " - - -
> the union contends that the firing of Mr. _____
> for not working excessive overtime is unjustified and too
> severe."

S- J- testified that, at the moment, he was confused and did not tell Liscano that the grievance(form) said nothing about a Doctor's appointment. He had told Liscano about the Doctor's appointment, but Liscano said "Let it read this way." When Liscano was recalled as a witness, his testimony was vague and evasive as to why the grievance form made no mention of a Doctor's appointment. I asked him why it was not on the form. He responded that he usually has the employee sign a blank form, and then fills it in later from his notes and that he turns in the completed form later.

Also introduced in evidence was a one page document, which apparently is a copy of two documents. One is a Doctor's receipt form, the handwritten portion of which shows the date as 12-5-75 and that $15.00 was received from S- J- for "Follow-up on accident of 6-18-75." and it is signed "Leo Ariola." The other document is on a printed letterhead which reads:

> "
> 12-5-75
> Mr. S- J- has been suffering from severe recurrent
> headaches and severe backache since 6-18-75 when
> he was in a car accident. He has been working since
> 9-2-75 even tho he has not been feeling well--his
> usual tour of duty lasts 48 hours. However, he
> cannot possibly work excessive overtime.
>
> Leo Ariola "

S- J- testified that he asked the Doctor (Ariola) to write a note to confirm that he had an appointment with him.

James Tierney, a shop committeeman (not a shop steward) testified that he was in the grievance meeting and Castelluccio came in a couple of times. Once he got Kurz out of the meeting. Castelluccio did say he might have to discharge employees, but did not say who (he would have to discharge).

According to Kurz, Castelluccio did tell the Committee that he had

excused Spencer (the employee who had to take his wife to the Doctor), that he had discharged the two Grievants after warning both that they would be fired and that he had gotten two other employees to work overtime. Kurz added that about a year before, he had told Castelluccio, that if it were necessary to order overtime, to use the seniority list and, if no valid reason, the man could be fired.

Supervisor Brathwaite, maintenance foreman, corroborated Castelluccio's testimony concerning the "exit interviews".

Kurz, recalled as a witness, testified that the first time he heard that S- J- claimed to have a Doctor's appointment was at the 4th step of the grievance procedure on December 19, 1975--and at that time, a Mr. Roberto--a union man said the Union did not know of the Doctor's appointment on December 5.

Castelluccio, recalled as a witness, testified that S- J- did not tell him at any time on December 5 that he had a Doctor's appointment that evening. Furthermore, he did not speak to S- J- prior to calling him into his office on December 5.

Liscano, recalled as a witness, stated that he did not recall Roberto saying at the 4th step grievance meeting that the Union did not know of the Doctor's appointment on December 5.

The hearing in this matter was held on May 19, 1976 in a hotel conference room and time did not permit the Parties to make their closing oral arguments. Each agreed to submit a post-hearing memorandum in lieu thereof. After a delay, agreed to by the Parties, the memoranda were forwarded to me on June 2, 1976 by the American Arbitration Association.

CONTENTIONS OF THE PARTIES

A distillation of the argument made by the Union is that, although overtime is not considered "voluntary", it is not wholly involuntary. The Employer, in this instance used the device of discharge for refusal to work overtime in order to achieve a new procedure, never before applied by the Employer, or accepted by the union, to enforce overtime requirements by fear of discipline. The employees had no reason to believe that failure to work overtime would result in discharge, without warning, without consideration of reasons for refusal, or without consideration of their work records. There was no evidence or suggestion that either had ever failed to work overtime prior to the day of their discharge. When the Employer, at or after 2 p.m. on a Friday afternoon, requested that they work overtime, they had every reason to believe they could decline if they had reasonable cause to do so. The two employees' reasons were supported with documentation at the hearing. Mr. Castelluccio, admittedly an excitable man, was under pressure to obtain the needed men and seemed little concerned with the validity of the excuses offered by the Grievants. The Union also points out that it is left to the Arbitrator to determine whether the Company met its obligation to provide the Grievants with union representation within the meaning of the Company's contractual obligation to do so.

The Employer's argument, in brief, is that the Union no longer argues that the overtime was excessive, but that the Company should have entertained

the reasons advanced by the Grievants and excused them from working the overtime.

The excuses offered by the Grievants were too meager to be given consideration. W- A- said he had to pick up his car and go shopping. S- J- offered no excuse whatsoever. The Company was being challenged on its policies. Indeed W- A- said "I'm not working, if I accept it, you'll think I'm afraid, fire me." The Company had no other course but to discharge these junior employees. As to the possible allegation that the imposition of a discharge in this case is too severe, the Company clearly indicated to the Union at the time that it was going to discharge these employees, but the Union did not instruct the employees or request them to work and then grieve. The Union, by its inaction, acquiesced in these employees' refusal. In regard to the allegation that the Grievants did not have an opportunity to consult with a Union representative prior to leaving the plant, the testimony was that both met with Mr. Liscano, the Union Steward, privately, and then with him and Al Kurz, the personnel manager, to discuss the pay they would receive upon termination. At no time during the course of that meeting did either employee raise any other reason for not working overtime than they previously advanced to Mr. Castelluccio. For them now to advance additional reasons at later times is totally incredible.

DISCUSSION

There are many issues of credibility involved in attempting to reconstruct the facts of the events of December 5, 1975. How many times did Castelluccio go into the grievance meeting to tell everyone there of the overtime problem? Did Castelluccio tell them the names of the Grievants and what excuses they had given? Did Castelluccio speak with S- J- before calling him in to his office that day? Did S- J- have a Doctor's appointment that day? Did S- J- tell Liscano about the Doctor's appointment? Did W- A- tell Castelluccio that his car was in the paint shop and he had to pick it up because the paint shop would not store it?

It is not necessary to resolve every credibility issue, but it is necessary to determine what excuses were given by the Grievants on that day, and whether, under the circumstances, the Employer had just cause to discharge the Grievants.

In regard to Grievant S- J-, all the evidence leads to one conclusion; that on December 5, 1975, he stated no reasor for his refusal to work overtime. S- J- testified that he told Liscano, the shop steward, that he couldn't work that evening because he had a Doctor's appointment. The grievance form, however, makes no mention of this reason. S- J- testified that he asked the Doctor to write a note to confirm that he had an appointment with him (on December 5, 1975) but the note does not confirm this appointment. Mr. Kurz testified that the first time he heard about S- J-'s excuse that he had a Doctor's appointment was at a grievance meeting on December 19, 1975 and that a Union representative said the Union did not know about the Doctor's appointment on December 5, 1975. After Kurz testified to this effect, Liscano, the shop steward, merely said he could not recall Roberto, the Union representative, saying this. I find, therefore, that Grievant S- J- offered no excuse on December 5, 1975 for his refusal to accept the overtime assignment.

In regard to Grievant W- A-, the evidence appears to establish that

W- A- not only stated that he had to pick up his car and go shopping, as stated by the Employer's witnesses, but also that he told Castelluccio that he had called the paint shop and it would not store his car over the weekend. This was not contradicted by Castelluccio, when he was recalled as a witness. At the hearing, everyone was being pressured by the hotel staff to leave the hearing room when Castelluccio was recalled and he might have contradicted W- A-'s testimony on this specific point if not for the time factor. Nevertheless, W- A-'s testimony in this regard is uncontradicted. Bolstering W- A-'s credibility, moreover, is the note from the paint shop, attesting to the necessity for W- A- to pick up his car that evening. In addition to this, W- A- admitted that he did not tell Castelluccio that day that he had a sick wife and two small children, and that was why he needed his car to do the necessary shopping. W- A- also did not deny saying that if he accepted the assignment, they'll think he's afraid. He testified that he did not recall saying it. I find, therefore, that Grievant W- A- offered the excuse that his car was in the paint shop, that the paint shop would not store the car, and he had to pick up his car and go shopping. The fact that W- A- did not also tell Castelluccio that his wife was sick and he had two young children weakens what would have been, in my opinion, a good excuse for his refusal. Furthermore, his statement that if he did work overtime, "they" would think he was afraid, further weakens his excuse and shows defiance rather than cooperation with management.

There are many arbitration awards dealing with discharge or other discipline for refusal of overtime work. It is well settled that management has the right to assign reasonable amounts of overtime work, unless there are express restrictions in the collective bargaining agreement. In a well recognized text, Elkouri and Elkouri, How Arbitration Works, Third Edition, pg. 494, it is stated:

> "- - - where the agreement is silent management has the right to make reasonable demands for overtime work from employees (citations omitted) - - - if it is of 'reasonable' duration, commensurate with employee health, safety and endurance and the direction is issued under reasonable circumstances (citations omitted) Another qualification is that management must be willing to accept reasonable excuses advanced by the employee (citations omitted) - - - but the adequacy of notice may be viewed merely as one of the relevant considerations in determining the adequacy of any excuse offered for not working overtime."

Umpire Harry Shulman, in a case where overtime was assigned shortly before quitting time stated,

> "- - - If he is given advance notice sufficient to enable him to alter his plans, he must do so. But if the direction is given to him without such notice, then it would be arbitrary to require him to forego plans which he made in justifiable reliance upon his normal work schedule--unless, indeed, his commitments are of such trivial importance as not to deserve consideration. A rule of thumb is not possible. What is required is sympathetic consideration of the individual's situation and makeup." Ford Motor Co. 11 LA 1158,1160 (1948).

Umpire Shulman reduced the suspension in that case, from three days to one day.

Originally, the employee had been discharged, but then was reinstated with a three day layoff.

In any number of arbitration awards, arbitrators have held that discharge is too severe a penalty for even willful refusals to work overtime. See for example, Wilson Laboratories, 52 LA 762 (Larkin); Budd Co., 52 LA 1290 (Keefe); Mead Corp., 55 LA 1279 (Hon); Carnation Co., 59 LA 1003 (Levin). In one case where an employee refused to obey a direct order to perform required overtime past his regular shift, an arbitrator concluded that the penalties of a one week suspension and a written warning were too severe Anaconda Aluminum Co., 60 LA 677 (Dolson). Of course, there are some cases where a discharge has been sustained. The discharge of an employee for repeated refusals to work Sunday overtime without a reasonable explanation was justified under a contract giving the employer the right to require such work Yale University, 52 LA 752 (Dunlop).

Of course, prior arbitration awards are not binding upon this arbitrator. Nevertheless, I am persuaded, that the awards confirm my conclusion that in this case, discharge was not justified. These employees had worked overtime in the past with no problems; until that day, nobody had informed them that refusal to work overtime could result in discharge; it was unusual for them to work overtime on Fridays, and they worked regularly on Saturdays. On the other hand, both knew they were required to work overtime and some discipline was necessary. In the case of S- J-, his was an outright refusal with no excuse, which warrants more severe discipline than the case of W- A-, who had a reasonable excuse, but failed to adequately communicate it. It is regrettable that union representatives weren't able to consult with the Grievants and with management before the discipline was imposed. The newly negotiated Section 30.1, however, does not require prior notification. It does state that, "The disciplined employee shall be allowed to remain in the Personnel Office until he has seen a Union representative." I contrue this to mean that management shall instruct the disciplined employee to remain in the Personnel Office, if he so desires, and that management will then call in a Union representative who may then consult with the employee. This the Employer did not do--and notifying the Union, at the meeting in progress, that it was discharging the two employees, even assuming, without deciding, that the names were given, did not comply with the section's requirements.

THE REMEDY

Under all the circumstances, I conclude that the discharge of S- J- be reduced to a two week's suspension without pay; that the discharge of W- A- be reduced to a one week's suspension without pay and that both Grievants be offered reinstatement, with full back pay except for the periods of suspension, to their former positions with all of their seniority rights and other privileges. The calculation of back pay shall be in accordance with National Labor Relations Board procedures. Interest at 6% per annum will be added to the back pay due. See Isis Plumbing & Heating Co., 138 NLRB 716. Net earnings which are to be credited against the gross back pay figure shall include the following:

1. Actual earnings during the back pay period less any expenses peculiar to such earnings.

2. Any earnings which the Grievant could have earned from substantially similar employment but wilfully failed to earn. The Grievant, if unemployed during the period, as proof of his efforts to secure other employment, must show that he registered with the State employment agency.

3. Net earnings do not include such items as welfare payments, earnings from any concurrent work that the Grievant performed while regularly employed by the Employer; or unemployment compensation benefits.

At the request of both Parties, I am retaining jurisdiction of this matter, should any dispute arise concerning the calculation of back pay. In that event, upon notification by the American Arbitration Association, I would reopen the hearing and take the evidence necessary to issue a supplementary award.

AWARD

The Employer discharged the Grievants S- J- and W- A- without just cause.

Grievant S- J- shall be notified by the Employer that he was suspended without pay for a two week period from December 5, 1975.

Grievant W- A- shall be notified by the Employer that he was suspended without pay for a one week period from December 5, 1975.

The Employer shall offer the Grievants reinstatement to their former positions with all of their seniority rights and other privileges.

The Employer shall reimburse the Grievants in accordance with the remedy set forth above.

Dated: July 1, 1976
Scarborough, New York

Bertram T. Kupsinel

BERTRAM T. KUPSINEL, ARBITRATOR

NOTICE OF CROSS-PETITION

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- x

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, : 77 Civ. 400 (CLB)

Petitioner, :

-against- : NOTICE OF CROSS-PETITION

KENTILE FLOORS, INC. :

Respondent. :

- x

S I R S :

PLEASE TAKE NOTICE, that the undersigned will bring the within Cross-Petition on for hearing before Charles L. Brieant, a Judge of this Court, at Room 705, United States Courthouse, Foley Square, City of New York, on the 15th day of March 1977, at 9:30 A.M., or as soon thereafter as counsel can be heard.

New York, New York
March 10, 1977

FELLNER AND ROVINS
Attorneys for Respondent
Address: 230 Park Avenue
New York, N.Y.10017
Telephone Number:(212)686-4500*

By: S/
Carl A. Schwarz, Jr.
A Member of the Firm

TO: VLADECK, ELIAS, VLADECK & LEWIS, P.C.
1501 Broadway
New York, New York

*Effective March 14, 1977 our new telephone number will be (212) 661-7200

ANSWER AND CROSS-PETITION TO VACATE ARBITRATION AWARD

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	:	77 Civ. 400 (CLB)
Petitioner,	:	
-against-	:	ANSWER AND CROSS-PETITION TO VACATE ARBITRATION AWARD
KENTILE FLOORS, INC.,	:	
Respondent.	:	

The Answer and Cross-Petition of Kentile Floors, Inc., by its attorneys, Fellner and Rovins, shows as follows:

1. Kentile submits this Answer to the Petition to confirm arbitration award and moves to vacate in part the same award which was issued by Bertram T. Kupsinel on July 1, 1976 (the "Award") and transmitted to Kentile Floors, Inc. ("Kentile") and District No. 15, International Association of Machinists and Aerospace Workers [AFL-CIO] (the "IAM") by the American Arbitration Association on July 2, 1976. (A copy of the Award and the Opinion of the Arbitrator are attached as Exhibit B to the Petition.)

2. Kentile seeks to vacate that part of the Award which the Union alleges directed Kentile to pay interest at the rate of six percent (6%) per annum on back pay awarded to Stephen Jute and William Anzueta (the "grievants").

3. Kentile's grounds for vacature of that part of the Award, providing for such interest, are that the arbitrator exceeded his powers or so imperfectly executed them that a material, final and definite award on the subject matter submitted was not made.

JURISDICTION AND VENUE

4. This Court has jurisdiction under the Labor Management Relations Act, 1947, as amended, 29 U.S.C. §141 et seq. and the United States Arbitration Act, 9 U.S.C. §2.

5. Title 9 U.S.C. §10 and §12 provide for the vacature of arbitration awards on motion to this Court.

THE PARTIES

6. Kentile Floors, Inc. is a corporation incorporated in the State of New York, having its principal place of business at 58 Second Avenue, Brooklyn, New York.

7. Kentile is an "employer" within the meaning of 29 U.S.C. §152(2).

8. The IAM is a "labor organization" within the meaning of 29 U.S.C. §152(5).

9. The IAM has its principal place of business within this judicial district at 7 East 15th Street, New York, New York.

FACTUAL BACKGROUND

10. On or about December 5, 1975, a dispute arose between the parties as to whether the grievants have been discharged for just cause from Kentile's employ. The grievants had refused to work overtime when ordered to do so by Kentile. The IAM grieved the discharge claiming that the penalty of discharge was too severe. (See Grievance, Exhibit 1 hereto)

11. Kentile and the IAM were unable to resolve the grievance and submitted the grievance for arbitration to Bertram Kupsinel under the auspices of the American Arbitration Association, as provided by the Collective Bargaining Agreement between Kentile and the IAM, which has been submitted to the Court as Exhibit A to the Petition.

12. It is Kentile's position that:

(a) The Arbitrator in awarding interest on back pay to the grievants exceeded his authority, since interest is not provided for under the Collective Agreement between Kentile and the Union.

(b) The Arbitrator exceeded his authority under the submission made to him by the parties since neither the grievance in dispute, or the parties at the hearing requested him to determine if interest should be awarded on back pay. The arbitrator's award of back pay was "sua sponte" and without authority.

(c) The Award of the Arbitrator does not provide for interest and therefore is technically unenforceable. (The Arbitrator's unsworn opinion provides for interest not the Award itself).

THE COLLECTIVE BARGAINING AGREEMENT

13. The Agreement which was the basis for submitting this dispute provides (inter alia) that claims for unjustifiable discharge and disciplinary actions shall constitute grievances and if not amicably settled shall be subject to arbitration (See §30 of Agreement, Petitioner's Exhibit A]. The dispute therefore, which was submitted to the arbitrator has its origins in the grievance filed by the Union. That grievance states:

> "The Union contends that the firing of Mr. Jute and Mr. Anzueta for not working overtime is unjustified and too severe."

THE SUBMISSION TO THE ARBITRATOR

14. At the hearing, the Company contended that discharge was appropriate; the Union contended that to discharge the grievants was too severe and unreasonable, and that the grievants should be "restored to their employment with full back pay and with no loss of other benefits." [See page 7, Post-Hearing Memorandum submitted to arbitrator by Judith P. Vladeck, attorney who represented the Union before the arbitrator, Exhibit 2 hereto.]

15. At no time did the Union ever submit to the Arbitrator a request that interest be applied to back pay. Therefore, Kentile never had an opportunity to answer or present any opposition as to this issue before the Arbitrator.

16. Kentile and the Union have been in a collective bargaining relationship for over twenty years. Never before has an arbitrator awarded interest on an award of back pay.

17. This petition is signed and verified by Carl A. Schwarz, Jr., the attorney for Kentile Floors, Inc., on behalf of Kentile, since the matter recited herein are of record and since he is the person who appeared and represented Kentile Floors, Inc. at the hearing before the Arbitrator.

18. Except for the payment in interest which is in dispute herein, Kentile in all other respects has fully complied with the Award.

Wherefore, respondent prays that a judgment be entered.

1. Vacating that part of the Award which may be held to direct Kentile to pay Steven Jute and William Anzueta interest on back pay awarded by the arbitrator at the rate of 6% per annum.

2. Awarding respondent costs and disbursements of this action.

3. Such other and further relief as to this Court appears to be just and proper.

Respectfully submitted,

KENTILE FLOORS, INC.

By: S/ Carl A. Schwarz, Jr.

March 10, 1977

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CARL A. SCHWARZ, JR., being duly sworn, deposes and says:

That he is a member of the firm of Fellner and Rovins, and General Labor Counsel for Respondent, Kentile Floors, Inc., that he has read the foregoing Answer with Cross-Petition to Vacate Arbitration Award and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

S/
Carl A. Schwarz, Jr.

Sworn to before me
March 10, 1977

ARTHUR STUART KRAMER
Notary Public

ARTHUR STUART KRAMER
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in New York County
Term Expires March 30, 19[illegible]

EXHIBIT 1 TO CROSS-PETITION - GRIEVANCE FORMS, ANZUETA, JUTE

DISTRICT No. 15

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
A.F.L. - C.I.O.

Nº 8406

MEMBERS GRIEVANCE FORM

Local Lodge No. 295

Name of Company: Kentile Floors Inc.
(Print)

Name of Employee: WILLIAM ANZUETA Clock No. 701
(Print)

Shift: Day Department: Maint. Date: 12-5-75

EMPLOYEE'S STATEMENT OF GRIEVANCE:

the Union contends that the fireing of Mr Anzueta for not working excessive overtime is unjustified and too severe.

Signature of Employee: William Anzueta Signature of Steward: Gilbert Lisconi

COMPANY OR FOREMAN'S ANSWER:

Grievance denied. Employees are required to work emergency overtime when requested by the company.
The overtime requested Dec 5, 1975 was not excessive or unreasonable.

Authorized Signature: Frank Castellucci Date: Dec 8, 75

GRIEVANCE COMMITTEE'S REPORT OF CASE IN SECOND OR THIRD STEP.

Grievance denied for same reasons as done.
AKay 12/10/75

FINAL DISPOSITION OF CASE:

Grievances should be made out in triplicate form:

One Copy to the Company: One Copy to the Union: One Copy to the Shop-Steward.

CX 1

A-42

DISTRICT No. 15

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

A.F.L. - C.I.O.

MEMBERS GRIEVANCE FORM

Nº 8407

Local Lodge No. .....

Name of Company: KENTILE FLOORS INC
(Print)

Name of Employee: STEPHEN WILLIAM JUTE Clock No. 707
(Print)

Shift: ..... Department: MAINTENANCE Date: 12-5-75

EMPLOYEE'S STATEMENT OF GRIEVANCE:

The Union contends that the fireing of Mr Jute for not working excessive overtime is unjustified and too severe.

Signature of Employee: Stephen W. Jute Signature of Steward: Gilbert Liciano

COMPANY OR FOREMAN'S ANSWER:

Grievance denied. Employees are required to work emergency overtime when requested by the Company.
The overtime requested Dec 5, 1975 was not excessive or unreasonable.

Authorized Signature: Frank Castelluccio Date: Dec 8, 75

GRIEVANCE COMMITTEE'S REPORT OF CASE IN SECOND OR THIRD STEP.

Grievance denied for same reasons as above.

[signature] 12/10/75

FINAL DISPOSITION OF CASE:

Grievances should be made out in triplicate form:

One Copy to the Company: One Copy to the Union: One Copy to the Shop-Steward.

EXHIBIT 2 TO CROSS-PETITION - LETTER BRIEF OF PETITIONER TO ARBITRATOR

VLADECK, ELIAS, VLADECK & LEWIS, P. C.
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ROBERT M. STONE

WRITER'S DIRECT DIAL

AREA CODE 212
221-2550

IRA S. ROBBINS
COUNSEL

May 24, 1976

Bertram Kupsinel, Esq.
American Arbitration Association
140 West 51st Street
New York, N.Y. 10020

RE: 1330-1951-75
District 15, IAMAW
and
Kentile Floors
(Stephen Jute and William Anzueta)

Dear Mr. Kupsinel:

Counsel for the parties in this matter agreed to submit their closing arguments in letter form. This letter constitutes the Union's position, in summary.

Initially, it is submitted that there was no just cause shown for the imposition of any discipline, let alone discharge, on the grievants, and thus the Union seeks their reinstatement with full back pay and no loss of other benefits.

The test of the merits could be made by examining the contract, the practice, and the testimony of the Employer's witnesses, taken in the most generous spirit. The contract provides a five day, Monday to Friday, week. By practice, Saturday overtime is virtually required. Weekday, pre and

post-shift overtime is not unusual in the Maintenance Department. Also, by practice, persons needed to perform daily overtime are selected by a process developed to assure fair distribution of overtime -- that is, a shop committeeman is informed of the number of men required, and he advises Supervision of the names of the people who will be working.

It is agreed that overtime is not considered "voluntary," in that the Union has not succeeded in having any provision written into the contract making it a matter purely of the employees' option. Nor is it wholly involuntary, with the employer deemed to be free to require unlimited work days or work weeks by the imposition of overtime. No such right can be implied in the contract language.

Thus, the question becomes one of the employer's right to use the device of discharge for refusal to work overtime (whatever the reason) in order to achieve a new procedure, never before applied by the employer, or accepted by the union, to enforce overtime requirements by fear of discipline.

The only prior discipline for refusal to work overtime was believed to have occurred in the case of the legendary "Skippy" some twenty years ago; the Union's response then (a walk out) cannot be deemed condonation of such device.

The arbitration decision submitted by the Company (Eisenberg) referred to the imposition of a one day suspension for a concerted refusal to work a pre-shift overtime stint as ordered. The Company had imposed that discipline.

Therefore, any employees, as the men here involved, had absolutely no reason to believe that failure to perform overtime work would result in immediate discharge, without warning, without consideration of reasons for refusal, or without consideration of their work records.

The two men here had been asked to agree at the time of their employment (as one presumes all Maintenance Department employees had been) that they knew they would be expected from time to time to work Saturdays, Sundays and holidays. There is absolutely no suggestion that they had ever failed or refused to do so. Nor is there any reason to believe that they had ever unreasonably refused to work daily overtime.

The Company's case makes clear that the grievants had no reason to believe that the request on Friday, December 5th, was any different from any other: If they were asked, and could work, they would; if they were asked and were unable to work, they would not, and no penalty would attach to their refusal.

Viewed in this context, the Company's request, at or after 2 p.m. on Friday afternoon, was one they had every reason to believe they could decline <u>if they had reasonable cause to do so</u>. They obviously believed they did. It is clear that the Company's representatives were in no position to judge fairly whether they did or not.

The Arbitrator had an opportunity to hear the grievants' version of the events of December 5th, and to judge their demeanor and credibility. The Arbitrator had an equal opportunity to judge the testimony of the Employer's witnesses. In testing the stories of all of the witnesses, it should be remembered that the two discharged employees were able to state, with documentation, the excuse which they had proffered to the Company, which the Company apparently was unwilling to consider. It should also be recalled that the Company's representative who had interviewed them or made the request of them that they perform the overtime work admitted that he had been under extreme pressure that afternoon and that he had felt himself to be in a very difficult situation. He did not disagree with the description of himself as very excitable. From all of the testimony it is clear that Mr. Kastelluccio felt himself to be very much under the gun in having to obtain

employees to do overtime work within the hour or two remaining before the end of the day shift. He had begun to go up the seniority list, a practice or procedure which he had presumably never employed before, although he seemed to recall having thought of doing it on one prior occasion.

In his anxiety to fill his quota, it appears that he was less than concerned about determining whether in fact there was a valid excuse for refusal to work overtime.

What does come out of this is the reasonable supposition that Mr. Kastelluccio and other Supervision decided that they were going to get men to work overtime regardless of how they did it, and if necessary, they were going to fire anyone who refused. This, of course, is not just cause for discharge.

The Company relies, improperly, it is submitted, on the framing of the statement of the grievance. The grievance does describe the complaint as one of requirement of excessive overtime. The choice of words for the description of the grievance was admittedly not that of the grievants themselves. The shop steward could not be absolutely certain whether he had actually written up the grievance on December 5th or December 6th. Nonetheless, he had no doubt in his mind at all that it

was he who chose the language of the grievance description. Having listened to both of the grievants who testified, and having become familiar with their choice of words, it should not require any further discussion to make clear that the grievants themselves had no responsibility for the specific words used in the grievance form.

It should also be recalled that the Company's contention that it had not been aware that Mr. Jute had had a medical appointment on December 5th until the third or fourth step grievance meeting must be considered in light of the fact that Mr. Jute did not appear at any of the earlier steps; nor in fact was he present even at the meeting where his medical history and doctor's appointment were acknowledgedly discussed.

This is clearly a case that should never have happened. Unfortunately, the Company, during a moment of tension and under the pressure of that Friday afternoon, behaved irrationally, arbitrarily and without justification. It now finds itself in a position of having to attempt to justify its conduct. There is no justification. To support the kind of conduct which was evidenced by the discharge of the two grievants would permit a company to rule by terror, allowing it to enforce any demand, however reasonable or unreasonable, by discharge or severe discipline.

Finally, it is left to the Arbitrator to determine whether the Company met its obligation to provide the grievants with union representation within the meaning of the Company's contractual obligation to do so.

It is respectfully submitted that the grievance should be sustained and the grievants restored to their employment with full back pay and with no loss of other benefits.

Very truly yours,

JPV:AG

Judith P. Vladeck

ANSWER TO CROSS-PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

77 Civ. 400 (CLB)

-and-

ANSWER

KENTILE FLOORS, INC.,

Respondent.

----------X

Petitioner, District No. 15, International Association of Machinists and Aerospace Workers, AFL-CIO ("District No. 15"), by its attorneys, Vladeck, Elias, Vladeck & Lewis, P. C., for its answer to the cross-petition herein, respectfully alleges:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "1", "2", "15", "16", and "17" of the cross-petition.

2. Denies the allegations contained in paragraphs "3" and "12" of the cross-petition.

3. Admits the allegations contained in paragraphs "4" through "11", "13", "14", and "18" of the cross-petition.

WHEREFORE, petitioner respectfully prays for an

order and judgment:

A. Dismissing respondent's cross-petition in its entirety, together with appropriate costs;

B. For such other, further and different relief as to the Court seems just and proper.

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Petitioner
1501 Broadway
New York, New York 10036
(212) 354-8330

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT L. JAUVTIS, being duly sworn, deposes and says:

I am associated with Vladeck, Elias, Vladeck & Lewis, P. C., attorneys for petitioner herein. I have read the foregoing answer to respondent's cross-petition and know the contents thereof, and that the same are true to the best of my knowledge, information and belief.

Robert L. Jauvtis

Robert L. Jauvtis

Sworn to before me this
14th day of March, 1977.

Carolyn M. White

CAROLYN M. WHITE
Notary [illegible] New York
[illegible]
Qual[illegible] County
Comm[illegible] [illegible] 30, 1978

PETITIONER'S AFFIDAVIT FOR ATTORNEY'S FEES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

-and-

KENTILE FLOORS, INC.,

Respondent.

---

77 Civ. 400 (CLB)

AFFIDAVIT FOR ATTORNEYS' FEES

STATE OF NEW YORK : COUNTY OF NEW YORK)

ROBERT L. JAUVTIS, being duly sworn, deposes and says:

1. I am associated with Vladeck, Elias, Vladeck & Lewis, P. C., attorneys for Petitioner, District No. 15. I make this affidavit in support of an award of attorneys' fees herein. As Petitioner's memoranda of law demonstrate, attorneys' fees are authorized in proceedings of this nature.

2. This litigation would be billed to our client at the rate of $60 per hour. All of the necessary work herein was performed by myself. I am the senior associate at the law firm and have been employed for 3-1/2 years. I have spent the majority of my tenure at the firm handling federal labor litigation. I believe that the hourly rate set forth is eminently reasonable.

3. The time spent on this matter related to the following tasks:

Research and drafting a notice of petition and petition to confirm arbitration award, answer to cross-petition, main and reply memoranda of law; together with the instant affidavit, communications with client and opposing counsel, oral argument on motion (estimate of one hour, including travel). This amounts to a total of 23 hours.

4. As disbursements were minimal, Petitioner only claims costs and attorneys' fees of $1,380 along with the substantive relief prayed for.

5. As it is germane to the right to recover attorneys' fees, I wish to bring to the Court's attention the fact that this law firm had to write three letters to respondent's attorneys attempting to ascertain why the interest on the back pay award was being withheld by respondent. Finally, some five months after issuance of the award, respondent first contended (by letter) that the interest portion of the award could not be enforced because the arbitrator exceeded his authority by granting the interest. Copies of the four relevant letters are annexed hereto as Exhibit "A".

Petitioner believes that this type of delay was unwarranted.

WHEREFORE, I respectfully request that Petitioner be granted $1,380 attorneys' fees herein.

Robert L. Jauvtis

Robert L. Jauvtis

Sworn to before me this

14th day of March, 1977

Carolyn M. White

CAROLYN M. WHITE
Notary Public, State of New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 1978

EXHIBIT A TO PETITIONER'S AFFIDAVIT -
LETTERS RE: INTEREST ON BACK PAY

October 14, 1976

Carl A. Schwarz, Jr., Esq.
Fellner & Rovens
230 Park Avenue
New York, New York 10017

Re: Kentile (Jute and Anzeuta)

Dear Carl:

Jerry O'Leary has told me that Kentile has not paid interest on the back-pay awards to the two grievants in this matter. I would appreciate knowing whether this is a matter of oversight or whether it is being done deliberately. If there is a reason for the withholding of the interest payment would you please let me know what it is. If there is none, would you please instruct the company to make payment since Jerry has had repeated inquiries from the grievants.

Sincerely yours,

Judith P. Vladeck

JPV:kd

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
COUNSELLORS AT LAW
1501 BROADWAY · NEW YORK, N.Y. 10036

STEPHEN C. VLADECK
SYLVAN H. ELIAS
JUDITH P. VLADECK
EVERETT E. LEWIS
SHELDON ENGELHARD

THOMAS T. KILHENNY
ROBERT L. JAUVTIS
ROBERT A. CANTORE
ROBERT M. STONE

AREA CODE 212
354-8330

IRA S. ROBBINS
COUNSEL

November 11, 1976

Carl A. Schwarz, Esq.
Fellner & Rovins
230 Park Avenue
New York, N.Y. 10017

RE: Kentile Floors & District 15, IAMAW
(Stephen Jute & William Anzueta)

Dear Carl:

On October 14th I wrote you concerning the interest on the back pay awards to the two grievants in this matter. A copy of the letter is enclosed for your convenience.

Jerry O'Leary has reminded me that we have received no answer from you. I would appreciate hearing from you on this.

Sincerely,

Judith P. Vladeck

JPV:AG
cc: Mr. Jerry O'Leary

VLADECK, ELIAS, VLADECK & LEWIS, P. C.
COUNSELLORS AT LAW
1501 BROADWAY · NEW YORK, N.Y. 10036

STEPHEN C. VLADECK
SYLVAN H. ELIAS
JUDITH P. VLADECK
EVERETT E. LEWIS
SHELDON ENGELHARD
MAX ZIMNY
—
ROBERT L. JAUVTIS
ROBERT A. CANTORE
DAVID M. EISENBERG
JUDITH P. BROACH
ARTHUR F. SILBERGELD

AREA CODE 212
354-8330

IRA S. ROBBINS
COUNSEL

December 1, 1976

Carl A. Schwarz, Esq.
Fellner & Rovins
230 Park Avenue
New York, N.Y. 10017

RE: Kentile Floors & District 15, IAMAW
(Stephen Jute & William Anzueta)

Dear Carl:

I would prefer not to move to confirm the award and to enter judgment for the amount of the interest, concerning which I wrote you on November 11th.

Your failure to respond to my inquiries will leave no alternative. Unless I hear from you within the next week, I will proceed in that fashion.

Sincerely yours,

Judith P. Vladeck

JPV:AG
cc: Mr. Jerry O'Leary
Mr. Joseph Solar
Dist. 15

LAW OFFICES

A-59

Fellner and Rovins

230 PARK AVENUE, NEW YORK, N.Y. 10017 · (212) 686-4500

LEONARD ROVINS
MORRIS J. FELLNER
ALAN D. GALLAY
WYNNE B. STERN, JR
RICHARD A. WILSKER
CARL A. SCHWARZ, JR.
DANIEL COHEN
RONALD KREISMANN
DONALD L. KAPLAN

December 3, 1976

Judith P. Vladeck
Vladeck, Elias, Vladeck & Lewis, P.C.
1501 Broadway
New York, New York 10036

Re: Kentile Floors & District 15, IAMAW
(Stephen Jute & William Anzueta)

Dear Judith:

I am sorry for not responding to your letter promptly. I was not attempting to evade answering, however, I was attempting first to get a definite position from the Company on this matter.

I am now prepared to give you our answer. After careful analysis of Mr. Kupsinel's award with the executives of Kentile Floors, we must inform you that the Company is not prepared to pay the 6% interest which Mr. Kupsinel awarded, since it is our position that in doing so, Mr. Kupsinel exceeded his authority as arbitrator.

Very truly yours,

Carl A. Schwarz, Jr.

CAS:nam

NOTICE OF ENTRY

ease take notice that the within is a *(certified)*
)py of a
ntered in the office of the clerk of the within
court on 19

Yours, etc.,
FELLNER & ROVINS

neys
ice and Post Office Address
230 PARK AVENUE
NEW YORK, N. Y. 10017

ney(s) for

NOTICE OF SETTLEMENT

-Please take notice that an order

which the within is a true copy will be presented
settlement to the Hon.

of judges of the within named Court, at

the day of 19
M.

ed,

Yours, etc.,
FELLNER & ROVINS

orneys for
Office and Post Office Address
230 PARK AVENUE
NEW YORK, N. Y. 10017

orney(s) for

Index No. 77 Civ. 400 (CLB)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

-against-

KENTILE FLOORS, INC.,

Respondent.

NOTICE OF CROSS PETITION

FELLNER & ROVINS
Attorneys for Respondent.
Office and Post Office Address, Telephone
230 PARK AVENUE
NEW YORK, N. Y. 10017
686-4500

To VLADECK, ELIAS, VLADECK & LEWIS

Attorney(s) for Petitioner

Service of a copy of the within
is hereby admitted.
Dated,

Attorney(s) for

MAR 16 1977

Cross Petition denied.

SO ORDERED

Charles L. Brieant
U.S.D.J.

U.S. DISTRICT COURT
FILED
MAR 16 1977
S.D. OF N.Y.

MICROFILM
MAR 16 1977

A-60
ORDER APPEALED FROM

ORDER APPEALED FROM

Endorsement

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Petitioner, v. KENTILE FLOORS, INC., Respondent.

77 Civ. 400-CLB

Although not requested to do so, the arbitrator in this case awarded interest on an award of back pay. This bizarre result was within the arbitrator's power, which includes the right to be wrong, or to decline to follow the precedents established in prior arbitrations. The stipulated submission to the arbitrator did not on its face or by implication limit his authority, or the nature and scope of the remedy he could grant. It will not be disturbed. Office of Supply, etc. v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972).

Non-compliance with New York CPLR §7507, if present, is of no moment since our proceedings here are regulated by the Federal Arbitration Act.

Respondent has paid all of the award except the interest. It cannot be said that its position was unduly obdurate, obstructive, or not in good faith. Accordingly, each party should bear its own legal expenses.

The Court will enter judgment.

So Ordered.

U.S. DISTRICT COURT
FILED
MAR 16 1977
S.D. OF N.Y.

Dated: New York, New York
March 16, 1977

MICROFILM
MAR 1 1977

Charles L. Brieant

Charles L. Brieant
U. S. D. J.

JUDGMENT APPEALED FROM

U. S. DISTRICT COURT
FILED
MAR 16 1977
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

-against-

KENTILE FLOORS, INC.,

Respondent.

- -X

77 Civ. 0400-CLB

JUDGMENT

77,392

On the Court's two (2) Memorandum Endorsements dated March 16, 1977, it is

ADJUDGED, that the Petition herein is granted to the extent therein set forth, and the Cross-Petition filed by Respondent is denied; and it is further

ADJUDGED, that Petitioner District No. 15 International Association of Machinists and Aerospace Workers, AFL-CIO, as collective bargaining agent for William Anzueta and Stephen William Jute, as interests may appear, recover of Respondent Kentile Floors, Inc. the total sum of $377.00, together with its costs to be taxed.

Dated: New York, New York
March 16, 1977

Charles L. Brieant
Charles L. Brieant
U. S. D. J.

MAR 1 [illegible]

JUDGMENT ENTERED - 3/17/77

Raymond F. Burghardt
CLERK

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DISTRICT NO. 15, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

-against-

KENTILE FLOORS, INC.,

Respondent.

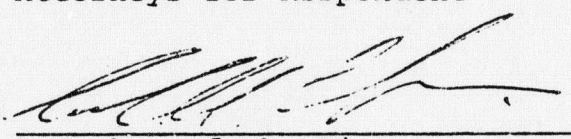
----------x

77 Civ. 400 (CLB)

NOTICE OF APPEAL

Notice is hereby given that KENTILE FLOORS, INC., Respondent above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of the Hon. Charles L. Brieant, U.S.D.J., entered in this proceeding on March 17, 1977.

FELLNER AND ROVINS
Attorneys for Respondent



A Member of the Firm
230 Park Avenue
New York, New York 10017
(212) 661-7200

Dated: New York, New York
April 15, 1977

TO: VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Petitioner
1501 Broadway
New York, New York 10036

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd. MASPETH, NYC

That on the 10th day of JUNE, 19 77, deponent personally served the within APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving ONE true Copy ~~copies~~ of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

VLADECK, ELIAS, VLADECK & LEWIS, P.C.
Attorneys for Petitioner-Appellee
1501 Broadway
New York, N. Y. 10036

Robert La Grassa

Sworn to before me this

10th day of JUNE, 19 77.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979